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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 GERALD ASHFORD,
12 Plaintiff,
13 v.
14 JAMES HILL, et al.,
15 Defendants.
16

Case No. 5:22-cv-00846-SSS-KES

ORDER DISMISSING ACTION
WITHOUT PREJUDICE FOR LACK
OF PROSECUTION

17
18 **I.**

19 **BACKGROUND**

20 On May 19, 2022, the Court received a pro se civil rights Complaint (Dkt. 1)
21 with exhibits (Dkt. 4) from Plaintiff Gerald Ashford. He is an inmate in state
22 custody at the California Institute for Men (“CIM”) in Chino, California. On
23 October 6, 2022, the Court dismissed the Complaint without prejudice and with
24 leave to amend. (Dkt. 17.) On November 15, 2022, the Court received a First
25 amended complaint (Dkt. 22 [“FAC”].)

26 The Court dismissed the FAC without prejudice and with leave to amend.
27 (Dkt. 23.) On April 7, 2023, the Court received a Second Amended Complaint
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1 (Dkt. 32 [“SAC”]).

2 This time, by Report and Recommendation (“R&R”), the magistrate judge
3 recommended dismissing all the claims, with prejudice and without leave to
4 amend. (Dkt. 35.) The district judge adopted the R&R and significantly limited
5 the scope of any future amendments. (Dkt. 39.) On July 28, 2023, the Court
6 ordered Plaintiff to file his Third Amended Complaint (“TAC”) no later than
7 August 25, 2023. (Dkt. 40.) Plaintiff was warned that failing to file a timely TAC
8 could result in the dismissal of his lawsuit. (*Id.*)

9 Plaintiff filed nothing by that deadline. On September 11, 2023, the Court
10 issued an Order to Show Cause (“OSC”) why the case should not be dismissed for
11 failure to prosecute. (Dkt. 41.) That OSC instructed Plaintiff to discharge it by
12 either filing a TAC, filing a written response to the OSC, or voluntarily dismissing
13 the lawsuit, by September 29, 2023. (*Id.*) As of the date of this Order, the Court
14 has not received any further filings from Plaintiff.

15 II.

16 LEGAL STANDARD

17 A district court may dismiss an action for failure to prosecute, failure to
18 follow court orders, or failure to comply with the federal or local rules. *See* Fed.
19 R. Civ. P. 41(b); *Link v. Wabash R. Co.*, 370 U.S. 626, 629-30 (1962); *Ghazali v.*
20 *Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). Central District of California
21 Local Rule 41-1 provides, “Civil suits which have been pending for an
22 unreasonable period of time without any action having been taken therein may,
23 after notice, be dismissed for want of prosecution.”¹

24 The Court has discretion to dismiss the action with or without prejudice.

26 ¹ The Local Rules of the U.S. District Court for the Central District of
27 California are available online at: [https://www.cacd.uscourts.gov/court-](https://www.cacd.uscourts.gov/court-procedures/local-rules)
28 [procedures/local-rules](https://www.cacd.uscourts.gov/court-procedures/local-rules).

1 See Fed. R. Civ. P. 41(b) (“[u]nless the dismissal order states otherwise,” or certain
 2 exceptions apply, a dismissal pursuant to Federal Rule of Civil Procedure 41(b)
 3 “operates as an adjudication on the merits”); Local Rule 41-2 (“[u]nless the Court
 4 provides otherwise, any dismissal pursuant to [Local Rule] 41-1 shall be without
 5 prejudice”); Al-Torki v. Kaempfen, 78 F.3d 1381, 1385 (9th Cir. 1996) (“Dismissal
 6 with prejudice and default on counterclaims, for willful and inexcusable failure to
 7 prosecute, are proper exercises of discretion under Federal Rules of Civil
 8 Procedure 41(b), 16(f), and the inherent power of the court.”).

9 In determining whether to dismiss a case for failure to prosecute or failure to
 10 comply with court orders, the Ninth Circuit has instructed district courts to
 11 consider the following five factors: (1) the public’s interest in expeditious
 12 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
 13 prejudice to the defendants; (4) the availability of less drastic sanctions; and (5) the
 14 public policy favoring disposition of cases on their merits. In re
 15 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir.
 16 2006). The test is not “mechanical,” but provides a “non-exhaustive list of things”
 17 to “think about.” Valley Eng’rs v. Elec. Eng’g Co., 158 F.3d 1051, 1057 (9th Cir.
 18 1998).

19 III.

20 DISCUSSION

21 Here, the first two factors favor dismissal. The first factor—the public’s
 22 interest in the expeditious resolution of litigation—“always favors dismissal.”
 23 Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999). The second factor—
 24 the Court’s need to manage its docket—favors dismissal because Plaintiff’s
 25 “noncompliance has caused [this] action to come to a complete halt, thereby
 26 allowing [him] to control the pace of the docket rather than the Court.” Id.
 27 (internal quotations marks omitted).

28 The third factor—prejudice to Defendants—weighs in favor of dismissal,

1 although perhaps not as strongly as some of the other factors. Because this Court
2 dismissed multiple complaints on screening, Defendants have not been served. See
3 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (“We have previously
4 recognized that pendency of a lawsuit is not sufficiently prejudicial in and of itself
5 to warrant dismissal.”); Hunter v. Sandoval, No. 17-cv-09257-CJC-SHK, 2018
6 U.S. Dist. LEXIS 210543 at *5, 2018 WL 6570870 at *2 (C.D. Cal. Dec. 12, 2018)
7 (finding no prejudice to a defendant who had not yet been served but still
8 dismissing the lawsuit without prejudice). On the other hand, a rebuttable
9 presumption of prejudice to the defendants arises when a plaintiff unreasonably
10 delays prosecution of an action, In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994),
11 and unnecessary delay “inherently increases the risk that witnesses’ memories will
12 fade and evidence will become stale.” Pagtalunan, 291 F.3d at 643.

13 The fourth factor—availability of less drastic sanctions—favors dismissal.
14 The Court’s prior orders warned Plaintiff that failure to respond might result in a
15 dismissal of this action. (Dkt. 40, 41.) See Ferdik v. Bonzelet, 963 F.2d 1258,
16 1262 (9th Cir. 1992) (“a district court’s warning to a party that his failure to obey
17 the court’s order will result in dismissal can satisfy the ‘consideration of
18 alternatives’ requirement”) (citation omitted).

19 The fifth factor—public policy favoring a disposition of an action on its
20 merits—arguably weighs against dismissal here. Pagtalunan v. Galaza, 291 F.3d
21 639, 643 (9th Cir. 2002). However, the effect of this factor is somewhat mitigated
22 by the fact that Plaintiff’s complaints failed to state claims for relief for the reasons
23 explained by the Court’s September 14, 2022, January 20, 2023, and July 27, 2023
24 dismissal orders. (Dkt. 17, 23, 39.)

25 Given that the enumerated factors largely support dismissal, this action will
26 be dismissed pursuant to Rule 41(b) and Local Rule 41-1. Considering all of the
27 circumstances, and in particular given that Plaintiff is incarcerated and proceeding
28 pro se, the dismissal shall be without prejudice.

IV.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment will be entered dismissing this action without prejudice for failure to prosecute.

DATED: October 19, 2023



SUNSHINE SUZANNE SYKES
UNITED STATES DISTRICT JUDGE

Presented by:



KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE